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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-530

JOHN R. CHERUP, et al, *Petitioners,*

v.

PITTSBURGH PLATE GLASS COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

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PITTSBURGH PLATE GLASS COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

John R. Cherup and the 213 other Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered on June 25, 1973.

OPINIONS BELOW

The opinion of the District Court (App. 1a - 11a) is reported at 350 F. Supp. 386. The opinion of the Court of Appeals (App. 13a - 14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

This is an employee suit for unpaid overtime compensation under the Fair Labor Standards Act of 1938, as amended. Pursuant to a long-standing practice of early relief, which was not instituted at the request or behest of the employees and in which the employer knowingly participated and never sought to abolish, shift workers punched-in as much as 25 minutes prior to the commencement hour of their regular shift, reported to their work sites, made their relief and went to work. Near the end of the shift they, in turn, were relieved early from their posts of duty but were required by the employer to remain on the company premises so as to punch-out at the end of the shift and not before.

Although recognizing that the scheduled shift hours were compensable, the District Court found that the "principal" activities performed during the pre-shift period resulted in no "significant benefit" to the employer, were "voluntary" in nature, were not made compensable by contract, custom or practice and that the time involved was thus within the ban of Section 4 of the Portal-to-Portal Act of 1947 (29 U.S.C. 254). As to the essential clothes-changing and showering activities engaged in by some of the employees, the Trial Court based its denial of liability on the fact that these activities were performed on "company time" when they occurred near the end of the shift and that they were barred by the *de minimis* doctrine when they were performed prior to shift time. Notwithstanding the *amicus* intervention of the Secretary of Labor, who is responsible for the Act's administration and enforcement, the Court of Appeals affirmed for the "reasons stated by the District Court".

The significant questions thus presented concern the proper interpretation of the Portal-to-Portal Act and the resolution of

the apparent conflict of the instant decision (and the two, recent decisions of courts of appeal upon which it is based) with the earlier decisions of this Court.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U.S.C. 251, *et seq.*), are set forth in the Appendix, *infra*, 1b - 4b.

STATEMENT OF THE CASE

This action was brought under Section 16 (b) of the Fair Labor Standards Act of 1938, as amended, by 214 shift workers employed in the chemical division of the respondent's Natrium (West Virginia) Plant to recover overtime compensation (together with liquidated damages, court costs and attorney fees) for pre-shift time spent in the performance of their regular duties and indispensable clothes-changing activities pursuant to a long-standing practice whereby the shift workers gave early relief to each other. 1.

The essential facts surrounding the early relief practice were not seriously disputed. Typically, the employees arrived at designated time clocks on the plant premises and, in the overwhelming majority of instances (83 per cent of the time), punched-in between 20 and 25 minutes before their scheduled shifts began. (Exhibits "F" through "X" to Stipulation, time cards; Exhibit "Y" to Stipulation, summary). By express contract, three shifts existed, to-wit: the day shift, 7:00 a.m. to 3:00 p.m.; the afternoon shift, 3:00 p.m. to 11:00 p.m.; and the

1. The shift workers sought recovery for work performed during the period from August 9, 1963, to June 7, 1965. By agreement, the matter of damages was severed and then, on the basis of selected deposition testimony, stipulated facts, various documentary evidence and argument, the case was submitted to the District Court on the singular issue of liability. There was no dispute about commerce or coverage.

night shift, 11:00 p.m. to 7:00 a.m. (App. 1a-2a).[2] Except for those employees who were required to change clothes, an employee working the day shift, for example, would punch-in, walk or ride to his work station, make his relief and commence working at least by 6:45 a.m., and usually earlier. (e.g., R.40-42).[3]

Although there was a dispute as to whether the employer encouraged the early relief practice, it was undisputed that the employer knew that shift workers were coming to work early during the relevant period (R. 412); that the shift employees were permitted by the employer to clock-in as early as 25 minutes prior to the inception of their regular shift (R. 412); that the individual time records reflected as much as 8 hours and 25 minutes per day on the premises (R. 412); that the shift employees were often waiting at the clock as much as 25 minutes prior to the commencement hour to punch-in (R. 412);that after punching-in, the employer permitted the shift workers to go to their job sites (R. 413); that the employer knew that the incoming employees were, in fact, relieving prior to the hour (R. 413); and that, after making their relief, the employer knew that the incoming employees performed the same functions (i.e., their "principal" activities) that they would normally perform during the balance of their shift. (R. 414). More importantly, it was also *undisputed that the employer not only "suffered or permitted" the practice but likewise never sought or attempted to abolish it.* (R. 358,359). (Emphasis added).

At the point of relief, the incoming shift worker would exchange information with the shift worker he relieved as to what activities had taken place on the preceding shift and what needed to be done during the next shift. Although it was not required by contract, the employer acknowledged that the exchange of information was expected on all shift jobs and, in some instances and departments, was useful and of some benefit to the company (R. 415,416,423,424,457), apparently because it contributed to

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2. Such references are to Appendix A. *infra.*
3. Such references are to transcript of testimony rather than designated portions thereof furnished the Court of Appeals.

an orderly transition and more productive and troublefree operation. The questioned practice insured a full exchange of such information, inasmuch as the outgoing employee was captive, knowing full well that he could not leave the premises. Moreover, as the employees' testimony illustrated (R. 30-32, 54,114,206,273), and the employer acknowledged (R. 416,417), the practice permitted the incoming and outgoing employees to work side-by-side on a particular problem that existed at the time of relief.

As previously mentioned, after making his relief, the incoming employee would then commence his regular duties which usually included instrument readings, many of which were required punctually. (R. 27,44,55,64,86,93,98,127,144,178,187,192, 207).

The relieved shift employee, in turn, was permitted to leave his work station and, if he chose, or, if he was so required, to wash, shower, change clothes or simply walk or ride to the area of the time clock. Although the employer contended that it did not "regulate" a relieved employee's time prior to punch-out (R. 396), the evidence demonstrated that the relieved employee's freedom of movement was restricted, that he could not go home, nor pursue personal activities or interests, nor enjoy home and family pleasures. Of course, the relieved employee was not free to leave the plant premises or clock-out before the scheduled end of his shift, i.e., "before the whistle blew". (App. 3a).

Moreover, it is clear that this latter requirement was a matter of express contract between the employer and the union. (R. 418,426). For example, according to the respondent's testimony, the employer bargained, or had the contractural right, to cause the shift workers to remain on duty until they were relieved and then not allow them to clock-out until the hour as a matter of contractural obligation between the employer and the bargaining unit. (R. 421). Shift workers who violated this rule by either clocking-out without being properly relieved, or consistently clocking-out prior to the hour after being properly relieved, were subject to penalty. (R. 421,423).

Notwithstanding the active participation of the employer in the practice however, the respondent never considered itself liable for any pre-shift activities even though they were the very type which the workers were engaged to perform. According to respondent's plant manager, "[i]f they chose to come in early on their own volition and with the full knowledge that the rule was that they could not leave early, ***the fact is, we had no complaints,***.". (R. 315,419-420).

Its position in this regard, which was supported by both courts below, was that the ban of Section 4 of the Portal-to-Portal Act applies to all activities performed ouside the employees' regularly scheduled shift hours unless the activities are made compensable by contract, custom or practice. Therefore, during the period in controversy, respondent paid the shift workers only for their scheduled shift hours (R. 429-431,334,336), knowing full well that they clocked in early — generally 25 minutes ahead of the hour — and, after changing clothes, relieved the men then on duty who, because of respondent's own requirement that workers stay on the premises and not clock-out until the scheduled quitting time, showered and changed into their street clothes or otherwise occupied themselves while waiting to clock-out. 4.

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4. The early relief practice has been in effect ever since the Natrium Plant opened in 1943, as has defendant's requirement that employees be held over until their regularly scheduled quitting hour arrived. Although this hold-over requirement undoubtedly had the desired effect of "encouraging" workers to shower before changing into their street clothes, it was abandoned when a Wage-Hour investigator questioned the system in the summer of 1965. The early relief practice, however, was continued in modified form whereby shift workers may clock-in no earlier than 20 minutes and, at the other end of the shift, clock-out and leave the plant as soon as relieved. (App. 4a). The change in the practice has resulted in additional "free" time for all shift employees, every working day.

REASONS FOR GRANTING THE WRIT

In view of the undisputed facts, the lower courts' denial of recovery for the pre-shift activities in question here rests on an erroneous reading of Section 4 of the Portal-to-Portal Act.

The history of the Portal-to-Portal Act shows that a careful and purposeful distinction was drawn between Section 2 (which provided, *retrospectively*, that an employer would not be liable for back pay unless the compensability of the activity concerned had been fixed by contract or established custom); and Section 4 (which relates to *future* rights of compensation). The aim of Section 2 was to wipe out the large number of "existing portal-to-portal cases" which had been filed following this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187 (1946). See, 93 Cong. Rec. 2125, 2126, 2293, 2295. On the other hand, Section 4 expressly preserved the compensability of the "principal activity or activities" an employee is engaged to perform, and made noncompensable only those activities which are "preliminary" and "postliminary." The "key words" in Section 4, as pointed out by Congressman Walter (one of the House managers when the bill went to conference), are "principal activity or activities" (93 Cong. Rec. 4389). By omitting these words from Section 2 and including them in Section 4, Congress provided a strict rule for past claims and a discrete and more liberal rule for the future. Although purporting to decide the instant case under Section 4, it is abundantly clear that both courts below actually applied the broad, exclusionary standards of Section 2. (Emphasis added).

As this Court stated in *Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330 (1956), when it held the employer liable for essential clothes-changing and showering activities, "activities performed either *before* or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

for which covered workmen are employed ***" (*id.*, at 256). (Emphasis added). In reaching this conclusion, this Court noted that "while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, ***it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities" (*id.*, at 255). *A fortiori*, all time spent in principal activities is compensable under Section4 of the Portal-to-Portal Act.

Also compensable, as the respondent and both courts below recognized, is the waiting time which the shift workers were forced to spend at the plant after they had been relieved of their regular duties and had showered and changed into street clothes. Of the cases holding required waiting time to be compensable, see, *Mitchell v. Greinetz*, 235 F. 2d 621 (C.A. 10, 1956); *Willmark Service System, Inc., v. Wirtz*, 317 F. 2d 486 (C.A. 8, 1963), cert. den. 375 U.S. 897; *Aeromotive Metal Products v. Wirtz*, 312 F. 2d 728 (C.A. 9, 1963); *Wirtz v. Sullivan*, 326 F. 2d 946, 949 (C.A. 5, 1964). As the Fifth Circuit said in *Sullivan*, where the waiting time was due to the employer's rule that employees "stick around" when breakdowns occurred, the waiting time did not benefit either party, but it "was a detriment to the worker" and, therefore, compensable under the principles of *Armour & Co. v. Wantock*, 323 U. S. 126, 55 S. Ct. 165 (1944) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 63 S. Ct. 161 (1944).

The District Court's confusion concerning Section 4 of the Portal-to-Portal Act is apparent from the cases on which it relied — *viz.*, *Battery Workers' Union v. Electric Storage Battery Co.*, 78 F. Supp. 947 (E.D. Pa., 1948); *Blum v. Great Lakes Carbon Corp.*, 418 F. 2d 283 (C.A. 5, 1969), cert. den. 297 U.S. 1040; and *Jackson v. Air Reduction Co., Inc.*, 402 F. 2d 521 (C.A. 6, 1968). None involved indispensable clothes-changing and showering activities of the type found here, and one (*Battery Workers*) was concerned solely with the Portal-to-Portal Act's "retroactive provisions" embodied in Section 2 which,

as this Court pointed out in *Steiner, supra,* was "intended to outlaw claims prior to 1947 for wages based on *all* employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work" (350 U.S. at 255). (Emphasis added). See also, *Mitchell v. King Packing,* 350 U.S. 260, 76 S. Ct. 337 (1956).

Although the *Blum* and *Jackson* courts were called upon to construe Section 4 of the Portal-to-Portal Act, the *Blum* court expressed the view that its holding was consistent with the "few reported cases that are in point," including the *Battery Workers* case (418 F. 2d at 287), thus indicating that it failed to recognize the difference between Sections 2 and 4 of the Portal-to-Portal Act.

The District Court's confusion on this same point is further evident in its application of a *de minimis* finding to preclude recovery for the pre-shift, clothes-changing which was required for certain of the shift employees. Such a finding is clearly inconsistent with the further holding that the remaining, pre-shift "principal" activities are not compensable because of Section 4. The application of a *de minimis* ruling suggests that the activities are essentially or otherwise compensable (e.g., in this case, the clothes-changing being integral or indispensable to the other pre-shift, "principal" activities) but of such short duration as to be insignificant. However, the patent fallacy in the present ruling (as it now stands) is that the time spent in this pre-shift, clothes-changing is integral and indispensable (and otherwise compensable) to pre-shift, "principal" activities that are not compensable. Clearly, this is a *non-sequitur.*

Although the *Blum* and *Jackson* decisions represent an apparent departure from the principles long established by this Court in the idle or "waiting-time" cases, they are, nevertheless, distinguishable from the instant case on other grounds. In both cases, for example, the time in issue related to the period spent on the premises by the employees after being relieved. In the present case, the employer and both courts below correctly iden-

tified the claimed time to be that period prior to the regularly scheduled shift, thereby recognizing that the time spent by the relieved employees during the specific shift hours was compensable by contract, custom, practice or under the "waiting-time" decisions.

In addition, in *Blum*, the early relief practice was apparently instituted at the behest of the employees and, more importantly, *the employer, commensurate with its well defined legal duty, actively attempted to abolish the practice*, during years of labor negotiations with the employees' local union. (Emphasis added). Further, the evidence disclosed that the Texas employer refused to acknowledge the slightest benefit to its operation from the practice and in contrast to the instant case, the record therein is devoid of any admission by the employer that it was responsible by contract, custom or practice for the specific shift hours.

Although *Jackson* was decided some thirty and twenty years after the enactment of the Fair Labor Standards Act and the Portal-to-Portal Act, respectively, and the history of prolific litigation which followed, the opinion contains not one citation of authority. Nonetheless, in contrast to the instant case, the evidence therein revealed that the system of early relief *was instituted and continued at the specific request and insistence* of the employees. (Emphasis added). Then too, when the practice was discontinued, the affected employees were disappointed and all of them wished to return to the former system.

The foregoing factual circumstances in *Blum* and *Jackson* gave rise to a finding in both cases that it would be inequitable to permit recovery by the employees. As such, the decisions are believed to be contrary to the teachings of this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895 (1945). See also, *De Pasquale v. Williamsbauer Corp.*, 151 F. 2d 578 (C.A. 2, 1945); *Robertson v. Juneau Gold Mining Company*, 157 F. 2d 876 (C.A. 9, 1946); *Caserta v. Home Lines Agency, Inc.*, 273 F. 2d 943 (C.A. 2, 1959).

In the instant matter however, the employer totally failed to establish that the questioned practice was instituted at the *request*

or *behest* of the employees or *that the employer ever made any attempt to abolish the practice.* (Emphasis added). Rather, the employer here was a knowing and willing participant in the early relief practice in all its ramifications, took the benefit of it for years, then promptly discontinued it when the Wage and Hour Division investigated the matter. The respondent has not been lulled into any disadvantageous position.

Finally, the plain fact is that the shift workers were engaged in the performance of principal activities during most of the pre-shift time for which recovery is sought. As the District Court found, "[o]nce on the job the on-coming employee made the relief and assumed his regular duties". (App. 3a). Clearly, therefore, the ultimate decision of the courts below that such regular duties come within the ban of Section 4 cannot stand — for that statute cannot make what is actual work — not work.

In reaching that ultimate decision, it is likewise clear that the Trial Court applied erroneous standards — *viz.*, "[t]he lack of *significant benefit,* ***, when coupled with the *voluntariness* of the employees in reporting early, satisfies this Court that it would be *inequitable* to impose liability ***.". (App. 9a). (Emphasis added). It is believed that the "lack of benefit" standard is being confused with the benefit tests that must be applied in idle time situations (best expressed in the *Greinetz* and *Sullivan* decisions, *supra*). The "voluntariness" standard was condemned as long ago as 1949 in *Republican Publishing Co. v. American Newspaper Guild,* 172 F. 2d 943 (C.A. 1, 1949), where the Court said that the *crucial* question is not whether the work was *voluntary* but whether it was, in fact, performed with the *knowledge and approval of the employer.* As noted previously, before *Blum* and *Jackson,* the "inequitable" argument likewise had little merit. (Emphasis added).

Thus, having identified the claimed time as that period prior to the regular shift when the employees were performing their regular duties, it is submitted that the "suffer" or "permit" cases are dispositive and that the lower courts seriously erred in failing to find that the time spent was time worked within the ambit of the Fair Labor Standards Act. Although the employer clearly

did not "require" the pre-shift work, it knowingly "suffered or permitted" it to occur. And, it is well settled, that the term "employ", within the meaning of the Act [Section 3(g)] is defined and characterized by its two distinguishable shibboleths, namely, "suffering" or "permitting" to work. If the employer knows or has reason to believe that work is being performed, he must count the time as hours worked. *Lenroot v. Interstate Bakeries Corp.*, 146 F. 2d 325, (C.A. 8, 1945); *Handler v. Thrasher*, 191 F. 2d 120 (C.A. 10, 1951); *Wirtz v. Leonard*, 317 F. 2d 768 (C.A. 5, 1963); *Republican Publishing Co. v. American Newspaper Guild, supra; Wage and Hour Interpretative Bulletin*, 29 C.F.R. Sec. 785.11; *Wage and Hour Interpretative Bulletin*, 29 C.F.R. Sec. 785.13.

The ominous portent of the present decision is apparent. Hereafter, employers may open their gates at any hour to unwitting employees who are willing to arrive early and go to work. If thereafter called to task, the employer can blithely escape responsibility because the practice is "voluntary" or because the workers are unable to rebut the employer's assertion that the practice is not of "significant benefit" to the company.

Moreover, the decision represents another benchmark in a trend that contravenes the clear intention of the framers of the "fair labor standards". As we have previously illustrated, the *Battery Workers* decision was a Section 2 case. The *Jackson* case fails to cite a single authority. The *Blum* decision however, cites both *Jackson* and *Battery Workers*. *Cherup* continues this lemming-like phenomenon. Thus, doth error become compounded. It is imperative, therefore, that the potential loopholes opened by these decisions be closed now — once and forever.

CONCLUSION

It is respectively submitted that the petition for a writ of certiorari should be granted.

MADDEN AND HUGHES
John T. Madden
G. Charles Hughes

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN R. CHERUP, et al.,
Plaintiffs,

vs // CIVIL ACTION NO. 1565-W

PITTSBURGH PLATE GLASS COMPANY, a corporation,
Defendant.

MEMORANDUM ORDER

(Filed November 8, 1972)

Pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended, 214 employees of Pittsburgh Plate Glass Company instituted this civil action against their employer for the recovery of unpaid overtime compensation, an equal amount as liquidated damages, interest, court costs and attorney fees.

Each plaintiff is employed by defendant as a shift worker in one of the various departments of the Chemical Division of defendant's Natrium Plant which is located in this judicial district near the community of Natrium in Marshall County, West Virginia.

Defendant is a Pennsylvania corporation authorized to do business in the State of West Virginia. Its Natrium Plant is a three-shift, twenty-four hour continuous process operation engaged in the manufacture of heavy chemicals. The three shifts at the Natrium Plant were established by labor contract to run

from 7:00 o'clock a.m. to 3:00 o'clock p.m., from 3:00 o'clock p.m. to 11:00 o'clock p.m., and from 11:00 o'clock p.m. to 7:00 o'clock a.m.

It has been stipulated that the plaintiffs and defendant corporation are within the respective definitions of employee and employer as set forth in § 3 of the Act, 29 U.S.C. § 203; that the defendant corporation was engaged in commerce within the meaning of the Act; and that this Court has jurisdiction of this matter by virtue of 28 U.S.C. § 1337. It was further stipulated that each plaintiff was either a member of the International Chemical Workers Union, AFL-CIO, from June 7, 1963 to February 28, 1964, or a member of Local 45 of the International Chemical Workers from February 28, 1964 to June 7, 1965, the recognized collective bargaining agents for the time important to this litigation.

More specifically, plaintiffs contend that they are entitled to overtime compensation at the rate of one and one-half times the regular hourly wage under the provisions of § 7 of the Act, 29 U.S.C. § 207, for work performed in excess of forty hours during the period from August 9, 1963, to June 7, 1965. In their original complaint plaintiffs sought recovery for excess hours from June 7, 1963, to June 7, 1965. The initial date was later amended to August 9, 1963. Plaintiffs allege that this excess work was the result of defendant's "suffering, and permitting, and also encouraging" the plaintiffs to clock-in as much as twenty-five minutes prior to the commencement of the shift and to report early to their working stations, and of defendant's "requiring" the plaintiffs to remain on the plant premises until the scheduled clocking - out time.

Recognizing the inherent procedural difficulties in an action which is in reality 214 individual causes of action, counsel requested the Court to rule on the primary issues of defendant's liability for compensatory damages. This ruling is based on the pleadings, selected testimony, stipulations of the parties, various exhibits, written briefs and the oral argument of counsel. Under this procedural arrangement between counsel and the Court, if liability

is found, then the referral of this case to a special master for a determination of amounts due and owing each individual plaintiff was considered to be the proper and practical manner of further proceeding.

In a further attempt to fully develop and present this case, counsel for both sides have chosen fifteen plaintiffs for the purpose of eliciting testimony. This testimony is in the form of depositions and is recognized as being representative of the testimony of all plaintiffs as to the liability issue. In addition to these depositions the Court also has before it the depositions of three plant officials.

As illustrated by plaintiffs, a typical shift employee at the Natrium Plant during the time covered by this action would arrive at a designated time clock where he could punch in as much as twenty - five minutes early. The employee would then either walk or ride to a locker area, change his clothes and then report to his working station. If he was not required to change clothes and did not choose to do so, the employee reported immediately to his working station after clocking in. Once on the job the on - coming employee made the relief and assumed his regular duties.

The relieved employee, although permitted to leave his work station and to wash up and change clothes, was required to remain on the plant premises and not clock-out until the scheduled end of the shift.

Thus if a shift employee at the Natrium Plant reported to work early and worked a regular eight hour shift, he would receive eight hours pay despite the fact that his time card for that day would reflect time in excess of eight hours.

It is this extra time minus noncompensable time, time spent in traveling to the work station and in changing clothes, which forms the basis of plaintiffs' claims to overtime compensation.

Related to the claims of the 214 named plaintiffs are the additional claims of an unknown number of plaintiffs who are seeking compensation for time which they spent in changing

clothes. These claims were not specifically raised in the complaint but are based on the fact that the plant required these plaintiffs to change their clothes before and after work.

The date of origin and initial purpose of the early relief practice are not exactly clear. It appears, however that the practice went into effect near the beginning of plant operations in 1943 (Deposition tr. at 314), and that its inception was due in part to employee participation in car pools which were necessitated by the plant's rural location and by the rationing of gasoline and automobile tires during World War II (Deposition tr. at 343-45).

From the commencement of the early relief practice until 1955, defendant's shift employees were allowed to clock-in twenty minutes early; after 1955 this permissible time period was extended to twenty-five minutes. (Deposition tr. at 403, 451-52). Adopting one of two alternative suggestions made by an investigator from the Wage and Hour Division of the United States Department of Labor, the defendant changed its reporting procedure on June 7, 1965. Exhibit E. As an alternative to the procedure adopted, it was suggested that the company inform its shift employees that they were not to make their relief until the hour. (Deposition tr. at 408). Other than making these suggestions, the Labor Department apparently took no official action in this matter. After this date, the shift employees at the Natrium Plant were only allowed to clock-in twenty minutes early and were permitted to leave the plant premises immediately upon being relieved.

It is evident from the testimony presented that there was no plant requirement that the Natrium shift employees clock-in early. The voluntary nature of the early relief practice is also indicated by plaintiffs' time cards. These cards, filed as exhibits in this action, reveal that the time a particular employee reported early would vary within the twenty-five minute time period from day to day, and that an employee's pay was not reduced if he failed to report early. An employee reporting on the hour would still receive eight hours pay for that shift.

In resisting plaintiffs' claims, defendant asserts that it neither required the shift employees to report early nor required them to immediately relieve their fellow employees in the event they did report early. Rather, the defendant maintains that the shift employees requested the extra time for personal reasons and that it permitted the employees to report early merely as a convenience to the employees. Defendant refers the Court to the above mentioned fact that a shift employee was paid for eight hours regardless of whether he reported twenty-five minutes early or on the hour. Defendant thus concludes that it would be inequitable to find the company liable for a service which it has rendered to the employees at the employees' request.

Although recognizing that they were not officially directed or requested to report early, plaintiffs allege that they were encouraged by defendant to do so. They counter defendant's equitable argument with their own — that through its acquiescence the defendant benefited from the early relief arrangement and that any decision in the company's favor would result in its unjust enrichment.

The initial legal question in this matter asks what effect the Portal to Portal Act of 1947, 29 U.S.C. § 251, et seq., has on this litigation. In particular, 29 U.S.C. § 254 provides:

> (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—
>
> (1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either —

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Defendant points out that the labor contract in existence during the time period in question did not contain provisions regarding early relief. Relying primarily on Blum v. Great Lakes Carbon Corp., 418 F 2d 283 (5th Cir. 1969), cert. denied, 397 U.S. 1040 (1970); Jackson v. Air Reduction Co., 402 F 2d 321 (6th Cir. 1968); and Battery Workers' Union v. Electric Storage Battery Co., 78 F. Supp. 947 (E.D. Pa. 1948), cases with factual situations similar to this case, defendant argues that 29 U.S.C. § 254 bars recovery since there is neither an express contract provision nor a custom or practice which makes plaintiffs' pre-shift work compensable.

Plaintiffs argue on the other hand that § 254 works for the benefit of the employee and not the employer. They state the general principle to be:

> [I]f . . . all of these periods of time constituted an integral part of their principal duties they are entitled to recover compensation therefor without meeting the requirements of the Portal-to-Portal Act by proving a special contract under which they were to be compensated for these periods or a custom or practice under which compensation was made therefor.

Ciemnoczolowski v. Q. O. Ordnance Corp., 228 F 2d 929, 931 (8th Cir. 1955), aff'd sub nom. Dunning v. Q. O. Ordnance Corp., 233 F. 2d 902 (8th Cir. 1956), cert. denied, 352 U.S. 927 (1956) (citations omitted).

Emphasizing that once at his work station the relieving employee "performed activities which were an integral or indispensible part of [his] principal activity" plaintiffs contend that § 254 is inapplicable to the facts of this case.

Plaintiffs further state that an employer is liable under the Fair Labor Standards Act "for work which he knows, or has reason to believe, is being performed and the employer has the duty to see that unauthorized work is not being performed." See 29 C.F.R.

§ § 785.11, 785.13 (Supp. 1971). As noted by plaintiffs, the rulings, opinions and interpretations of the Wage and Hour Administrator may be considered by courts but they are not controlling. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Upon careful consideration of all matters presented, this Court finds defendant's position well taken. While plaintiffs have demonstrated the existence of a potential company benefit from the early relief practice, the record discloses but few instances where this potential was actually utilized. Plaintiffs firmly contend the existence of benefit can be implied from the fact that the company did not change the practice of early relief on its own initiative. Defendant disputes the assertion that it derived benefit from the early relief practice and logically explains that it chose not to change the practice because it appeared to be working satisfactorily.

Plaintiffs point out that under the old system the company might have two shifts on the plant premises near the end of a shift and the company could call on this "pool" of men to assist in the event of an emergency. This argument has been correctly classified as "tenuous" since it must be assumed that employees would naturally help on their own in event of a threat to the lives or wellbeing of fellow employees or the property of their livelihood. Jackson v. Air Reduction Co., 402 F. 2d at 524.

Plaintiffs also suggest that the former practice insured a smoother operation since the relieved employee could advise the relieving employee of any difficulties experienced during the previous shift. Likewise, on occasions the on-coming employee could assist the employee on the job in correcting a problem. (Deposition tr. at 30-32, 54-55, 273). It would appear, however, that these two situations are inherent in shift work where, as here, the on-coming employee makes passing contact with the relieved employee, and it would appear that these two situations would exist regardless of the reporting practices then in effect.

It has been shown that the practice of early relief allowed some employees to conduct their first rounds and record any

measurements or readings prior to the time the shift was scheduled to begin. (Deposition tr. at 192, 213-14, 272-73). Plant officials state that the taking of measurements before the hour was neither required nor significantly beneficial to the company. (Deposition tr. at 326-28).

Also, under the labor contract the plant had, and apparently still has, the authority to "tag" a relieved or soon to be relieved employee for continued work and thereby avoid "call out" pay. This authority has been exercised on occasions by the plant. (Deposition tr. at 149-50).

The lack of significant benefit, either solidly substantial or meritoriously intangible, when coupled with the voluntariness of the employees in reporting early, satisfies this Court that it would be inequitable to impose liability on this defendant. Under the facts here, compensation for early check-in overtime is and should be the proper subject matter of a labor contract.

The Court therefore adopts the rationale of the Blum, Jackson and Battery Workers' Union cases and finds that in the absence of an express contract provision, custom or practice providing for compensation, § 254 of the Portal-to-Portal Act precludes plaintiffs' recovery. This Court is not convinced that these three cases were erroneously decided or that they are materially distinguishable from this case.

It is also the opinion of this Court that under the facts of this case the individual claims for compensation for time spent in changing clothes should be denied.

The testimony shows that for safety reasons defendant required employees working in the chlorine mercury cell department to change into work clothes before reporting to their work stations (Deposition tr. at 397-98, 443); after being relieved these employees were required to remove their work clothes and were "encouraged" to shower before changing into their street clothes. (Deposition tr. at 444-45). In addition to mercury cell operators

plaintiffs suggest that other employees, e.g. those in sandblasting and foam-glass, might also be required to change clothes. (Deposition tr. at 446-47).

Plaintiffs cite Steiner v. Mitchell, 215 F. 2d 171 (6th Cir. 1954), aff'd, 350 U.S. 247 (1956), a case in which it was held that changing clothes and showering, if required by the employer for health reasons, were compensable activities, and not preliminary or postliminary activities within the meaning of the Portal-to-Portal Act. Also cited is 29 C.F.R. § 785.24(c) (Supp. 1971) which provides:

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensible to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity . . . . (emphasis added).

Here, however, the showering and the changing of clothes which occurred near the end of the shift were accomplished during the eight hours for which the employees were paid. Being on company time, there can be no additional compensation.

Under Steiner the time consumed in changing clothes before the start of the shift would clearly be compensable, but in light of the evidence that the Court has before it, the amount involved in this case would be too negligible to warrant an award of overtime compensation. One mercury cell operator estimated that it usually took him only three to four minutes to complete his change before reporting. (Deposition tr. at 10).

The Court will therefore apply the de minimus doctrine and deny the additional claims of those plaintiffs who were required to change clothes. Smith v. Cleveland Pneumatic Tool Co., 173 F. 2d 775 (6th Cir. 1949); see Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

For the reasons stated, an order may be prepared for entry dismissing plaintiffs' cause of action.

s/ Robert E. Maxwell
United States District Judge

November 8, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN R. CHERUP, et al.,

Plaintiffs,

vs // CIVIL ACTION NO. 1565-W

PITTSBURGH PLATE GLASS COMPANY, a corporation,

Defendant

JUDGMENT ORDER

This action came on for decision upon the pleadings, the stipulation of the parties, the testimony of the witnesses, the exhibits filed, briefs and argument of counsel, and the request of counsel for all parties that the Court rule on the issue of liability herein, all of which the Court has maturely considered, and for reasons set forth in a written opinion entitled "Memorandum Order", which is now made a part of the record hereof, is of the opinion that plaintiffs are not entitled to judgment, it is accordingly

ORDERED that plaintiffs take nothing in this action and that said action be, and it is hereby, dismissed at plaintiffs' costs. To all of which action the plaintiffs object and except.

Entered the 24th day of November, 1972.

s/ Robert E. Maxwell

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1166

John R. Cherup, et al,

Appellants,

v.

The Pittsburgh Plate Glass Company, a corporation organized and existing under the laws of the State of Pennsylvania, admitted to do business in the State of West Virginia,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, Chief District Judge.

(Argued June 4, 1973 Decided June 25, 1973).

Before Bryan, Senior Circuit Judge, Russell, Circuit Judge, and Knapp, District Judge.

PER CURIAM:

Shift workers in appellee's Natrium Plant in West Virginia brought suit in the District Court to recover, pursuant to Fair Labor Standards Act of 1938, as amended, 29 USC § 201 et seq., as amended, unpaid overtime compensation asserted to have been earned for work performed in excess of forty hours per week during the period from August 9, 1963 to June 7, 1965.

The District Court, relying in part upon Blum v. Great Lakes Carbon, 418 F2d 283 (5 Cir. 1969), cert. denied 397 US 1040 (1970) and Jackson v. Air Reduction Co., 402 F2d 521 (6 Cir. 1968), ruled that the Portal to Portal Act, 29 USC § 251 et seq., barred appellants' claims.

On consideration of the briefs, record and argument of counsel, we affirm for the reasons stated by the District Court, 350 F Supp. 386 (N.D.W.Va. 1972).

Affirmed.

APPENDIX B

STATUTES INVOLVED

29 U.S.C.A. § 203. Definitions

* * *

(g) "Employ" includes to suffer or permit to work.

29 U.S.C.A. § 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half time the regular rate at which he is employed.

29 U.S.C.A. § 252.

Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either —

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such

employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the

Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to May 14, 1947, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b) of this section. May 14, 1947, c. 52, Part II, § 2, 61 Stat. 85.

29 U.S.C.A. § 254

Relief from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either —

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section. May 14, 1947, c. 52, § 4, 61 Stat. 86.